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11 JUN 2007

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| In re Application of | : | |
| Roques et al. | : | |
| Application No.: 10/538,446 | : | DECISION |
| PCT No.: PCT/FR03/50153 | : | |
| Int. Filing Date: 04 December 2003 | : | ON |
| Priority Date: 09 December 2002 | : | |
| Attorney Docket No.: 034299-645 | : | PETITION |
| For: Door Designed To Be Inserted Between | : | |
| An Aircraft Cockpit And Cabin | : | |

This is a decision on applicants' submissions entitled "Request For Updated Filing Receipt" filed on 11 January 2007 and on 26 February 2007, which are being treated as a petition under 37 CFR 1.10(c).

BACKGROUND

This international application was filed on 04 December 2003, claimed a priority date of 09 December 2002, and designated the United States. The International Bureau transmitted a copy of the published international application to the USPTO on 01 July 2004. Consequently, the thirty month period for payment of the basic national fee in the United States expired as of midnight on 09 June 2005. On 10 June 2005, applicants filed *inter alia* the basic national fee.

On 07 November 2005, a Notice of Acceptance (Form PCT/DO/EO/903) was mailed to applicants, indicating the date of this application under 35 U.S.C. 371(c)(1), (2) and (4) to be 10 June 2005.

DISCUSSION

Petitioner requests that the correspondence (and fees) received in the USPTO on 10 June 2005 be accorded a filing date of 09 June 2005 on the basis of Express Mail evidence. Under 37 CFR 1.10(c), where a discrepancy can be shown between the filing date accorded to correspondence by the USPTO and the date of deposit as shown as the "date-in" on the "Express Mail" mailing label or other USPS notation, the Commissioner may be petitioned to accord the correspondence a filing date as of the "date-in" or other official USPS notation. The instant petition complies with 37 CFR 1.10(c)(1).

Concerning 37 CFR 1.10(c)(2), an Express Mail mailing label number, EV310861440US, was recorded on certain elements of the correspondence in controversy (including the specification, claims, abstract and drawings), but it was not recorded on all of the elements of the correspondence (such as the declaration and the Transmittal Letter bearing a fee authorization). Nor was it recorded on a cover or transmittal letter itemizing the papers and fees. Petitioner's attention is drawn to MPEP 513, which states in part that

However, if the number of the mailing label did not appear on the correspondence as originally filed, relief will not be granted on petition under 37 CFR 1.10(c) **>

(d), (e), (g) or (h)<, even if the party who filed the correspondence satisfies the other requirements of 37 CFR 1.10(c), 1.10(d) * 1.10(e)>, 1.10(g), or 1.10(h)<. To be effective, the number must be placed on each separate paper and each fee transmittal either directly on the document or by a separate paper firmly and securely attached thereto. In situations wherein the correspondence includes several papers directed to the same application (for example, the specification, drawings, and declaration for a new application), the correspondence may be submitted with a cover or transmittal letter which should itemize the papers. It is not necessary that the number be placed on each page of a particular paper or fee transmittal. Merely placing the number in one prominent location on each separate paper or fee transmittal (or cover sheet or transmittal letter which should itemize the separate papers and fees) will be sufficient.

Since the filing of correspondence under 37 CFR 1.10 without the number of the "Express Mail" mailing label thereon is an oversight that can be avoided by the exercise of reasonable care, requests for waiver of this requirement will not be granted on petition. A party's inadvertent failure to comply with the requirements of a rule is not deemed to be an extraordinary situation that would warrant waiver of a rule under 37 CFR 1.183, 2.146(a)(5) or 2.148, nor is such an inadvertent omission considered "unavoidable," within the meaning of 15 U.S.C. 1062(b), 35 U.S.C. 133, 37 CFR 1.137(a) or 37 CFR 2.66(a). See *Honigsbaum v. Lehman*, 903 F. Supp. 8, 37 USPQ2d 1799 (D.D.C. 1995) (Commissioner did not abuse his discretion in refusing to waive requirements of 37 CFR 1.10(c) in order to grant filing date to patent application, where applicant failed to produce "Express Mail" customer receipt or any other evidence that application was actually deposited with USPS as "Express Mail."), *aff'd* without opinion, 95 F.3d 1166 (Fed. Cir. 1996); *Nitto Chemical Industry. Co., Ltd. v. Comer*, 39 USPQ2d 1778, 1782 (D.D.C. 1994) (Commissioner's refusal to waive requirements of 37 CFR 1.10 in order to grant priority filing date to patent application not arbitrary and capricious, because failure to comply with the requirements of 37 CFR 1.10 is an "avoidable" oversight that could have been prevented by the exercise of ordinary care or diligence, and thus not an extraordinary situation under 37 CFR 1.183.); *Vincent v. Mossinghoff*, 230 USPQ 621 (D.D.C. 1985) (misunderstanding of 37 CFR 1.8 not unavoidable delay in responding to Office Action); *Gustafson v. Strange*, 227 USPQ 174 (Comm'r Pat. 1985) (counsel's unawareness of 37 CFR 1.8 not extraordinary situation warranting waiver of a rule); *In re Chicago Historical Antique Automobile Museum, Inc.*, 197 USPQ 289 (Comm'r Pat. 1978) (since certificate of mailing procedure under 37 CFR 1.8 was available to petitioner, lateness due to mail delay not deemed to be extraordinary situation).

In the instant case, the Express Mail mailing label number was recorded on the correspondence, all of which is shown by the official records of the USPTO to have been received on 10 June 2005. Based on the totality of the circumstances present in this case, it would be appropriate to conclude that 37 CFR 1.10(c)(2) has been satisfied.

With regard to 37 CFR 1.10(c)(3), counsel has provided a copy of the Customer Copy of an Express Mail mailing label, number EV310861440US, showing a "date-in" of "6-9-05" and bearing a USPS plug stamp dated "JUN 9 2005." Therefore, the requirements of 37 CFR 1.10(c)(3) have been satisfied.

Review of the declaration document reveals that it is defective in that it includes an uninitialed alteration of Mr. Mallaval's name.

The correspondence received in the USPTO on 10 June 2005 will be regarded as having been filed on 09 June 2005, per 37 CFR 1.10(c).

The Notice of Acceptance mailed on 07 November 2005 was issued in error, and it is hereby **VACATED**.

CONCLUSION

The petition is **GRANTED**.

This application is being forwarded to the National Stage Processing Branch for further processing, including the preparation and mailing of a Notification of Missing Requirements (Form PCT/DO/EO/905) requiring an oath or declaration compliant with 37 CFR 1.497(a) and (b) and a surcharge under 37 CFR 1.492(h).



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